HERCHUN SINGH & ORS. v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian & Ali F.JJ.) June 20, 1969]

[Kuala Lumpur—Federal Court Criminal Appeal No. X.25 of 1968]

Penal Code, ss. 392 & 395 — Gang robbery — Identification of accused — First information report — Omission in report — Confession of co-accused — Whether statement is a confession — Confession taken into consideration against accused — Confession may be called in aid to lend assurance to other evidence — Evidence Ordinance, 1950, ss. 17(2) and 30.

Criminal Law and Procedure — First information report — Use of — Criminal Procedure Code (Cap 6), s. 107.

In this case the appellants appealed against their conviction for gang robbery under section 395 of the Penal Code on the grounds: (a) the evidence of identification was unsatisfactory, and (b) the confession of one of the accused persons was not a confession and on that account should not have been taken into consideration against the appellants in the absence of other evidence implicating them and each of them.

Held, dismissing the appeal: (1) although the statement of the accused in this case contained self-exculpatory statements, they did not negative facts which constituted the offence and therefore the statement was a confession;

(2) the learned trial judge was correct in taking the confession into consideration against the other accused to lend assurance to the other evidence against them and to fortify him in believing the accused to be guilty;

(3) on the evidence there was sufficient independent evidence against the second appellant fortifying the naming of the second appellant in the confession to support the conviction;

(4) on the facts there was sufficient identification of the first and third appellants in this case to support their conviction.

Per Curiam: It is wrong to hold up the first information report as a sure touchstone by which the complainant's credit may inavariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances.

Cases referred to:—

(1) *Pakala Narayana Swami* v. *King-Emperor* [1939] M.L.J. 59; 66 I.A. 66, 81.

(2) *Public Prosecutor* v. *Lai Fong Yuen* [1968] 1 M.L.J. 12, 14.

(3) *Bhuboni Sadhu* v. *The King* A.I.R. 1949 P.C. 257.

(4) *Kashmira Singh* v. *State of Madhya Pradesh* A.I.R. 1952 S.C. 159.

(5) *Gunadhar Das* v. *State* A.I.R. 1952 Cal. 618.

(6) *Shoe Swaran* v. *King-Emperor* A.I.R. 1934 P.C. 227.

(1) *Ah Mee* v. *Public Prosecutor* [1967] 1 M.L.J. 220.

FEDERAL COURT.

Dato' Balwant Singh for the first appellant.

M.T. Segaram for the second appellant.

R. Ponnudurai for the third appellant.

K. Somasundram (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): These three appellants were among five persons charged with gang robbery under section 395 of the Penal Code. Of the other two one was acquitted. He was the younger brother of the first appellant. His defence, an alibi, raised some doubt in the mind of the learned trial judge who decided to give him the benefit of such doubt. The fifth accused was the one who had made a confession. He repeated it at the trial and was sentenced to two years' imprisonment the judge taking into account his having made a clean breast of things. He has not appealed. Upon an amended charge of robbery, under section 392 of the Penal Code, these appellants were convicted and each sentenced to seven years' imprisonment with six strokes of the rottan. They appeal against both conviction and sentence.

There are two common grounds of appeal against conviction: first, it was argued that the evidence of identification was unsatisfactory and secondly, that the confession of Ramasamy, the fifth accused, was not a confession and on that account should not have been taken into consideration against these appellants in the absence of other evidence clearly implicating them and each of them.

We think the most convenient and logical way to deal with these appeals is to start with the confession by Ramasamy. A confession, as defined in section 17(2) of the Evidence Ordinance, "is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence". The learned trial judge held, in our view quite rightly, that the statement by Ramasamy was a confession. It told of a robbery and of his own participation therein. More than that, he merely attempted to palliate his own offence by alleging that he acted under coercion. Of him the judge said, "He may not have been the villain of the piece but he did take part in the robbery". It follows that, so far as the self-exculpatory statements were concerned, the judge interpreted them as in no way negativing facts which constituted the offence. This, in our judgment, cannot be regarded as inconsistent with the pronouncement of Lord Atkin in *Pakala Narayana Swami* v.

King-Emperor [1] that "no statement that contains self-exculpatory matter can amount to confession if the exculpatory statement is of some fact which *if true would negative the offence alleged to* have been committed". The allegation of coercion even if true (which it was plainly held not to be), was no defence: see section 94 of the Penal Code. In the instant case the offence was a robbery, nothing in the statement negatived the commission of such offence or the deponent's participation therein, including his receipt of part of the proceeds of the crime. Consequently we hold that the statement was in the fullest sense a confession.

It carried full weight with the judge and we share the same view. It was wholly voluntary. It was made after he had caused himself to be taken into custody. What struck us most about the character of this confession is that in the telling no attempt was made to magnify the guilt of his confederates, in order that he might trade his own liberty for theirs. The inescapable fact here is that, whether or not it was true that he was an involuntary accomplice, his own guilt or innocence could not in any event have any bearing on their being answerable for the joint offence. This is important in evaluating the confession as contributing to the prosecution case.

Taking this view of the confession, it follows that section 30 of the Evidence Ordinance properly applies, so that the confession may be taken into consideration as against other persons jointly tried for the same offence who are affected thereby. In this connection, we would express our qualified agreement with the judgment of Ismail Khan J. (as he then was) in *Public Prosecutor* v. *Lai Pong Yuen* [2] where he followed *Bhuboni Sahu* v. *The King* [3] and *Kashmira Singh* v. *State of Madhya Pradesh*,[4] but not in the sense expressed by the learned Chief Justice in *Gunadhar Das* v. *State*.[5] In *Lai Pong Yuen* the judge said: "It is clear from a long line of authorities that a confession of a co-accused is only an element in the consideration of other evidence, *which evidence must be sufficient to support a conviction.*" In *Gunadhar Das* it was said similarly: "In short the conviction *must be based on the other evidence.* The confession can only be used to help to satisfy a court that the other evidence is true". In our judgment, however, the proper interpretation of section 30 is that of Bose J. in *Kashmira Singh*, as follows:—

> "The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed', a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, 'if believed', it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

In the instant case the learned trial judge, quoting with approval Bose J. in *Kashmira Singh*, went on to say:—

> "As regards the first and third accused (the first and second appellant), I first took into consideration the evidence against each of them, independently of the confession of the fifth accused. But I was not prepared to act on this other evidence as it stood so as to convict them. Against each of them, therefore, I called in aid the confession and used it to lend assurance to the other evidence and thus fortify myself in believing the two accused to be guilty. In other words, I threw the confession into the scale as an additional reason for believing the other evidence that there was against each of them."

We now turn to the next and main ground of appeal, whether the conviction could safely be upheld on the evidence of identification, such as it was.

Taking first the case of Mohamed Kassim, the second appellant, the only other evidence against him was the finding of a shoe in the mud from where the robbers embarked on the boat that took them away from the scene of the robbery only 30 yards off. According to Chief Inspector Abdul Hamid this shoe fitted the appellant Mohamed Kassim, but manifestly was of a size which would not fit any of the other suspects. This fact was readily demonstrable at the trial had counsel for any of the accused cared to avail himself of the opportunity, which they did not. The shoe was indubitably the property of one of the participants in the robbery, not of any member of the general public. Thus narrowed down to five persons, of whom four were eliminated, we consider it sufficient independent evidence, fortifying the naming of Mohamed Kassim in the confession, to support the conviction. We accordingly dismiss his appeal.

The first and third appellants, however, were not mentioned by name in the confession. This was plainly because, until Ramasamy met them for the first time on the night of the robbery, he was not acquainted with any of the others except Mohamed Kassim. Apart from the confession, nevertheless, there was the identification of each of them by their victim, the estate manager. It was strongly argued that the police report, made shortly after the robbery by the complainant, not only failed to identify them but contained the further statement "I do not know them (saya tidak kenal)". This statement was taken by a police constable of the rank and file only, who was stationed at the police post in Carey Island. It was contradicted by the complainant who denied he had said these words, in fact, he remembered telling

the police about Adaikan, the third appellant, as well as giving a description of the first appellant. He remembered telling the policeman that there were Sikhs among the robbers and that one of them was a brother of the estate watchman, but whose name he could not recollect at the time he made the report. The learned trial judge, having heard the complainant's explanation, was satisfied that the latter was still very much shaken by the alarming experience he had undergone when he made his report but that, despite his agitation, he did mention some names to the police. This was a finding of fact that the report which was taken down contained errors and omissions for which the constable alone was responsible. This view of the trial juge as to the credibility of the witness must be given proper weight and consideration. An appellate court should be slow in disturbing such finding of fact arrived at by the judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see *Sheo Swarup* v. *King-Emperor*.(6) Hence, this case is distinguishable from *Ah Mee* v. *Public Prosecutor*,(7) cited to us in argument, where the complaiant clearly gave the number of her assailant's car as M 6049, a contradiction for which she and no other person could have been held responsible.

As regards omissions in the first information report, we would endorse *Sohoni's* commentary on section 154 of the Indian Criminal Procedure Code (16th Edition, Vol. I, page 750), which is similar to section 107 of our Criminal Procedure Code, as follows:—

> "It is a mistake to believe that a person cannot be the accused unless his name appears in the first information report. The provisions of the Code lay down no such stipulation. All that is required for purpose of this section is that there should be clear, definite information about the commission of a cognizable offence to set the investigation machinery in motion. Further, the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain these matters. . . . The first information report is not an Encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not *ipso facto* lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.
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> When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the informant on that fact because of such omission. For a correct appraisal of the effect of omission as contradicting the informant it is essential to keep in view the circumstances in which the report was lodged.
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> For instance, an omission in a report hurriedly lodged under the press of events should not have the same significance as one in a report lodged after cool calculation."

In short, it is wrong to hold up the first information report as a sure touchstone by which the compainant's credit may invariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances.

We turn now to the case of the first appellant. Apart from being identified by the complainant, apart from his description being given by Ramasamy, there was an independent fact, thus stated by the learned judge:—

> "Having seen and heard the first accused give evidence in court and having watched his behaviour and his speech very carefully, I formed the opinion that he was the very sort of person who would be called a 'gila' . . . the Malay word . . . . to describe a person who is queer in his speech or behaviour."

This was a peculiar trait of the first appellant on which the judge who observed him was fully justified in forming his own opinion, as he in fact did. There was the utterly remarkable coincidence that Ramasamy so described this appellant, a complete stranger to him, in his statement in court as well as in his confession. He had stopped his boat by the river bank when he saw two figures, one of whom stepped into the boat, and the other who remained on land said the one who was going along was his brother who is a "gila" and "if you do not listen to him he will cut you". By no stretch of the imagination could Ramasamy have invented this story if he was not telling the truth of the first appellant and had not been together with him at the robbery. After the crime this same "gila" person was put ashore on Carey Island. This appellant was in fact a resident on the island and brother of the watchman. In our opinion the identification of this appellant by the complainant, while by itself insufficient to support a conviction, is convincingly corroborated by Ramasamy's description of him, which the judge from his own observation found to be both peculiarly apt and true. We, therefore, have come to the same conclusion as the judge as to this appellant's guilt and accordingly dismiss his appeal.

There remains the case of the third appellant Adaikan. The learned judge considered the evidence against him particularly strong because he left the hospital every night he was

a patient there, so that his absence from the ward on the night of the robbery could not have been vouched for by mistake or lapse of memory. It was a circumstance weighing very heavily against him. He was in hospital, between May 22 and June 2, 1967, for a deep cut on his left wrist. The robbery occurred on May 30. One Chellaperumal, a fellow-labourer on the estate, who was also a patient in the same ward during the relevant period, was positive that Adaikan left the ward every night at about 6 p.m. and returned at 6 the following morning. On the other hand, another patient, Nallandran, who was admitted into this ward on May 29, testified that Adaikan did not leave the ward on the night of the robbery or any other night, but was reluctant, nevertheless, to brand Chellaperumal as a liar. The particular night was remembered because he and Adaikan played a certain card game which was a new game to him and which he had never played before or since. Why the game of cards, assuming it to be true, was associated with the night of the robbery, was never explained. It is not surprising, therefore, that the learned trial judge, having to choose whom to believe, preferred Chellaperumal. He had the advantage of seeing and hearing both witnesses consequently we must defer to him in assessing their relative credibility. The learned judge was furthermore satisfied with the identification of this appellant by the estate manager. The arguments addressed to us have in no way affected the measure of our satisfaction that this appellant was rightly convicted. We therefore dismiss his appeal and affirm the sentence passed on all the appellants.

Appeal dismissed.

Solicitors: *Dato' Balwant Singh & Co.; M. Segaram & Co.; R. Ponnudurai.*

SKYLINE TRADING CO. v. TIOW YOKE LAN

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian and Ali F.JJ.) June 20, 1967]

[Kuala Lumpur—Federal Court Civil Appeal No. X.3 of 1969]

Contract — Inchoate contract — Payment of booking fee for purchase of flat — Sale subject to contract — Contract not accepted — Claim for return of booking fee.

The respondent had paid a booking fee of $2,000 for a flat on the understanding that she should sign a contract of purchase within two weeks of receipt of notice from the vendors. Subsequently upon informing herself of the terms of the proposed agreement and form of lease she told the solicitors for the vendors that she was not prepared to buy the flat on the terms of the proposed agreement, which offered a lease instead of a sale of the flat, and she asked for the return of the booking fee. As there was no response she commenced action in the sessions court but her claim was dismissed. The respondent appealed successfully to the High Court which ordered the return of the sum of $2,000. The appellants, the vendors, thereupon appealed to the Federal Court.

Held, dismissing the appeal: (1) the contract of purchase in this case was inchoate of the type where a purchaser of land agreed to purchase subject to a proper contract to be prepared by the vendor's solicitor;

(2) the booking fee in this case was paid on the condition that the amount was to form part of the purchase price in the event that a contract of purchase came to be executed, and as in this case no such contract was entered into the respondent was entitled to refund of the booking fee.

Cases referred to:—

(1) *Howe* v. *Smith* (1884), 29 Ch.D. 89.

(2) *Harrison* v. *Holland* [1921] 3 K.B. 297, on appeal [1922] 1 K.B. 211 .

(3) *Mayson* v. *Clouet & Anor.* [1924] A.C. 980.

(4) *Chillingworth* v. *Esche* [1924] 1 Ch. 97, 104.

(5) *Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, 289.

(6) *Coope* v. *Ridout* [1921] 1 Ch. 291.

(7) *Scammell* v. *Ouson* [1941] A.C. 251.

In the High Court, where the respondent was the appellant, *Peter Yeoh* appeared for her and *Eugene Lye* appeared for the company. The following judgment was delivered by the trial judge on December 7, 1968:

Syed Othman J.: On or about 7th October, 1964, the appellant paid the respondents the sum of $2,000 by way of booking fee for a flat on the second floor of a building on the understanding that she should sign a "contract of purchase" within two weeks from the date of notice of notification from the respondents.

On 1st March, 1965 the solicitors for the the respondents informed the appellant that the necessary documents were ready for her perusal and that she should make her first payment of $500 upon signing the agreement.

Upon reading the draft agreement the appellant on 9th day of April 1965 informed the solicitors that she was rejecting the terms of the lease, as according to her it was not in fact a sale as proposed by the respondents and asked for refund to her of the $2,000 booking fee. The respondents refused to refund it maintaining that the appellant's rejection of terms of lease, not sale, was unlawful, denied that there was lack of agreement and contended that the appellant was not entitled to the refund of the booking fee.

In an action by the appellant against the respondent claiming refund of the $2,000 before the sessions court, the learned president dismissed her action with costs. This appeal is against the dismissal.